

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MAX J. AYERS

Claimant

VS.

BRACKETT, INC.

Respondent

AND

AMERICAN HOME ASSURANCE CO.

Insurance Carrier

Docket No. 1,000,987

ORDER

Respondent requests review of the December 31, 2003 Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

FACTUAL BACKGROUND AND ISSUES

A regular hearing was held on September 11, 2003. As is routinely done, the parties entered into stipulations on the record regarding certain issues relating to the compensability of the claim. The nature and extent of claimant's alleged impairment, particularly the psychiatric component, has remained in dispute. During claimant's testimony, the ALJ suggested claimant might not be at maximum medical improvement. He expressed his concern as follows:

Let's go back on the record. All right. The Court has had discussions with counsel. The Court is going to insert an additional issue as to whether the Claimant is at maximum medical improvement and will review the evidence as submitted by the parties regarding that issue. I will proceed by allowing Mr. Crowley to cross-examine the Claimant and I'll set terminal dates and again decide the issue of whether he's at maximum medical improvement during those terminal dates. And if he is at maximum medical improvement--maximum medical improvement, I will

decide the issues of nature and extent of disability and future and unauthorized medical care at that point.¹

Thereafter, the parties proceeded with the presentation of their evidence by deposition. In addition, claimant requested further treatment for his depression with Dr. David Blakely. When respondent did not provide the requested treatment, a preliminary hearing was scheduled.

The preliminary hearing was heard by the ALJ on October 8, 2003. On October 10, 2003, a preliminary hearing Order was entered granting claimant's request for treatment with Dr. Blakely and the payment of outstanding medical bills. Respondent appealed the October 10, 2003 Order to the Board. The Board concluded it had no jurisdiction to review the ALJ's preliminary findings and issued an order on December 30, 2003 dismissing respondent's appeal.

Immediately thereafter, on December 31, 2003, the ALJ issued another Order. That Order is the subject of this appeal. The ALJ found as follows:

- (1) Claimant has suffered both physical and mental injury as the result of his work place accident of 11/13/01.
- (2) Claimant is not at maximum medical improvement in regard to his need for psychiatric medical care. Medical treatment is ordered continued with Dr. Blakely until claimant is released or further order. The parties' terminal dates are suspended.
- (3) Claimant was terminated from his position from the respondent as a result of his injuries and subsequent restrictions.
- (4) Temporary partial disability is ordered paid beginning May 31, 2003 at the rate of \$329.68 per week until further order or claimant is released from medical care or claimant returns to comparable wage employment. Claimant testified he began working at a passenger delivery service in May of 2003 at the rate of \$5.50 per hour and worked between 20 and 23 hours a week. The stipulated average weekly wage is \$610 per week. Claimant's temporary partial rate is therefore \$329.68.²

Presumably, the ALJ made these conclusions following his review of the evidence offered by the parties in connection with the September 11, 2003 regular hearing, although the December 31, 2003 Order is silent as to what materials or evidence was considered.

¹ R.H. Trans. at p. 25.

² ALJ Order (Dec. 31, 2003).

Respondent requests review of the December 31, 2003 Order. Respondent frames the issues for appeal in a series of questions:

1. Whether the administrative law judge has authority to grant benefits when there has not been established that a notice of intent to file for a preliminary hearing nor an application for a preliminary hearing had been properly served pursuant to K.S.A. 44-534a.
2. Whether the administrative law judge has authority to order respondent/insurance carrier to provide benefits for a contested condition beyond the date of final determination of the claim.
3. Whether the claimant suffered injury for temporary partial disability was granted under the order and if so, did such injury arise out of and in the course of employment.
4. Whether the administrative law judge has authority to order temporary partial disability at a rate which is contrary to the Act.
5. Does the administrative law judge's order constitute a final determination of the claim and if not, does the administrative law judge have the authority to conduct a regular hearing and a preliminary hearing simultaneously on the same claim.³

Claimant maintains the December 31, 2003 Order was not a final determination. Instead, the Order was merely a determination on a preliminary hearing issue, specifically whether claimant was at maximum medical improvement and if not, whether he was in need of further medical care. Thus, claimant argues the order is appropriate and the appeal should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The December 31, 2003 Order appears to be an order for preliminary hearing benefits. Indeed, the parties' briefs acknowledge this view. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues that are statutorily designated,⁴ or those

³ Application for Review at 2.

⁴ K.S.A. 44-534a(a)(2) (2000 FURSE).

instances where a party alleges that an administrative law judge exceeded his or her jurisdiction.⁵

Respondent argues the ALJ exceeded his jurisdiction by unilaterally suspending terminal dates and issuing the December 31, 2003 Order, which granted claimant medical treatment and temporary partial disability benefits. In addition, respondent maintains the statutory procedure set forth by K.S.A. 44-534a was not followed. Further, respondent contends the issue of temporary partial disability benefits was never the subject of any 7-day demand nor was there any indication during the September 11, 2003 hearing that claimant was seeking those benefits. Accordingly, the Board finds it has jurisdiction to consider this appeal pursuant to K.S.A. 2001 Supp. 44-551(b)(2)(A).

After examination, the Board finds the bulk of the December 31, 2003 Order to be identical in content with that set forth in the order issued October 10, 2003, with the exception of the ALJ's decision on December 31, 2003 to award temporary partial disability benefits. Although the language used within the first order differs slightly from the second, both orders direct respondent to provide medical treatment with Dr. Blakely and pay either past due or ongoing medical expenses related to that care.

Admittedly, the ALJ's December 31, 2003 Order is somewhat unorthodox in its execution and timing, but the order merely reiterates the contents of the October 10, 2003 preliminary hearing order. During the September 11, 2003 hearing both parties were made aware of the ALJ's concern that claimant had not yet achieved maximum medical improvement and needed further treatment. Those comments led to another hearing which yielded the October 10, 2003 Order granting further treatment. Each party was aware of the ALJ's concerns and had an opportunity to be heard.

Upon receipt of the October 10, 2003 Order, respondent appealed. But that decision was not something over which this Board has jurisdiction under K.S.A. 44-534a. That appeal was therefore dismissed on December 30, 2003. Immediately thereafter, the ALJ issued the order that is the subject of this present appeal.

Although the practice is not recommended and was not necessary, the ALJ did not exceed his authority in issuing the December 31, 2003 Order granting claimant medical treatment with Dr. Blakely. The order merely reiterated the order issued in October 2003. The Board finds the ALJ did not exceed his jurisdiction in issuing that order, at least as to medical treatment. Accordingly, that aspect of the order will be affirmed.

As for paragraph number (4) four of the Order which directs respondent to pay temporary partial disability benefits, the Board finds the ALJ exceeded his jurisdiction. There is no indication within the record that claimant sought temporary partial disability

⁵ K.S.A. 2001 Supp 44-551(b)(2)(A).

benefits at any time. Respondent was never given an opportunity to address this issue or provide evidence that might dissuade the ALJ from entering such an order. This disregard for due process consideration is improper. The Board finds the order granting temporary partial disability benefits exceeded the ALJ's authority in this matter. For this reason, that portion of the December 31, 2003 Order is set aside.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated December 31, 2003, is set aside in part and affirmed in part.

IT IS SO ORDERED.

Dated this _____ day of March, 2004.

BOARD MEMBER

c: Roger Fincher, Attorney for Claimant
Matthew Crowley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director